IN THE CIRCUIT COURT FOR HANOVER COUNTY.

LUCK *v.* KERSLEY, *et al.*

1. Title by Estoppel—After-Acquired Title.—Where a grantor who has no title conveys goods and chattels with general warranty, and subsequently acquires the title or estate which he purports to convey, such after-acquired title will enure to the grantee, or to his benefit, by way of estoppel. There is no distinction between a deed for land and a deed for goods and chattels.

2. Same—Same—Case at Bar.—A conveyed to B by deed of September 8, 1904, but which was never recorded, standing timber on C tract. B sold to A on February 1, 1906, 239 cords on the same tract, and 321 cords about the middle of March on the same place. A, by deed dated February 9, 1906, and recorded on 12th of same month, conveyed by deed of trust with general warranty 400 cords of wood on C tract. On April 9, 1906, by bill of sale recorded on same day, B sold and delivered to A 700 cords of wood on C tract. Held, that the deed of trust dated February 9, 1906, was a lien upon the cord wood subsequently acquired by A.

3. Trees and Timber—As Realty or Personalty.—Standing trees are real estate. But when the trees are severed they cease to be real estate and become personal property.

4. Same—Trees Severed—Title and Possession of Vendee.—The vendee's possession of severed trees is complete, and no innocent purchaser for value and without notice can claim the property, and if, under such conditions, the original vendor of the real estate sells it, such vendor is selling what he does not own, and to which he has no title, and can give none, agreeable to the maxim, nemo dat quod non habet.

5. Officers and Agents of Private Corporations—Notice.—Where a deed for chattels was written by A as attorney for the parties thereto, but this deed was never recorded, and the same chattels were subsequently conveyed by deed of trust to a bank of which A at the time of drawing the above-mentioned deed was president, it was held, that this was not notice to the bank, such as would cut off the defense of purchaser for value without notice, because the rule is that knowledge of facts acquired by an officer or agent of a corporation is notice to the corporation, only where it is acquired by him while acting within the scope of his duties.

MASON, J. E., Judge.

Dora A. Kersley and W. R. Kersley sold and conveyed to the plaintiff by deed of September 8th, 1904, standing timber on the "Cady tract" in Hanover. This deed was never recorded. It was written by W. D. Cardwell as attorney for the parties thereto, and who was at that time president of the Hanover Bank.

According to the allegations of the bill, and the deposition of the plaintiff on page two, he "sold" to Mrs. Kersley about two hundred and thirty-nine cords of wood about February 1st, 1906, cut and corded on same tract, and three hundred and twenty-one cords, including slabs, about the middle of March, on the same place.

The deed of trust to Doswell, trustee, from Kersley and wife, conveying four hundred cords of wood "cut and corded" on the premises described "Cady tract," to secure the bank a debt, is dated 9th of February, 1906, and was recorded on the 12th of the same month.

On the 9th day of April, 1906, a bill of sale, or an agreement, was entered into between the plaintiff and the Kersleys and recorded same day, reciting that the plaintiff had sold and delivered that day seven hundred cords of wood to the latter, most of it being on the "Cady tract," and some on another tract which is not in controversy. It is admitted that these transactions involved the same wood, cut by Luck, by virtue of deed of September 8th, 1904.

From the evidence in the record all the severed wood was Mrs. Kersley's, because Luck, the complainant, says in his deposition he had "sold" it to her.

Doswell, trustee, and the Hanover Bank, beneficiary in the above-mentioned deed of trust, among other things, claim they are innocent purchasers for value without notice, because the above deed of September 8, 1904, was not recorded, and they had no actual notice of the transaction between the grantors and the grantee in the deed.

Now, admitting that Mrs. Kersley had the 239 cords before the deed of trust (see Luck's evidence, page 2), and that she bought from Luck 321 cords (Luck's testimony), after this deed of trust had been recorded, she had to account for 400 cords of her wood on the "Cady tract." As a matter of fact she did not own 400 cords at date of deed, but did own 239 cords, and purchased from Luck 321 cords subsequently (but before the bill of sale)—in all 560 cords. The question therefore which presents itself is:

Has the deed of trust a lien upon the wood, on the "Cady tract" which she acquired subsequently to the deed?

Mr. Justice Story, in Mitchell *v.* Winslow, 2 Story 630, says: "It seems to me a clear result of all authorities that whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor, or not, or if personal property, whether it was in esse or not, it attached in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting claim thereto under him either voluntary, or with notice."

The deed from Kersley to Doswell, trustee, contains a "general warranty." "When a person, without title, having conveyed with warranty, subsequently acquires title, it enures to the benefit of the grantee who is said to acquire the title by estoppel." 16 Cyc. 683. "If a grantor, having no title, conveys with warranty and subsequently acquires the title or estate which he purports to convey, or perfects his title, such after-acquired title will enure to the grantee, or to his benefit, by way of estoppel." 16 Cyc. 689, where all the Virginia authorities are cited (under note 27), which I have examined, and need not be further referred to. I have been able to find no Virginia case which refers specifically to chattels, but am unable to see the distinction in principle between a deed for land and a deed for goods and chattels. "The rule above stated applies to transfers of personal property as well as real estate." 16 Cyc. 692. "If a person without title to chattels, mortgages them and subsequently acquires title, it enures to the benefit of the mortgagee." 16 Cyc. 692, note 27. "If two conveyances are made by a person having no title, a title subsequently acquired by him enures to the benefit of the first grantee," and "a record of a mortgage prior to the acquisition of title by mortgagee is constructive notice to a subsequent purchaser in good faith from the mortgagor." 16 Cyc. 699.

In case of Morrison *v.* Caldwell, 17 Am. Dec. 84, the identical question arose, except real estate was involved instead of personal. This was a conflict between a first-secured deed of trust, given by the same grantor to secure debts, who, at time of giving deed, had no title. Trustee in first deed took the estate and their grantee was secured in title by the court. The court says: "It has often been held by this court, that where a person conveys and warrants, and has no title, and afterwards acquires title, this after-acquired title enures to the benefit of, and passes to, his alienee. And in case of two conveyances by him when he had no title, we have no hesitation in saying that the title enures to the benefit of, and passes to the first grantee, if he is a fair purchaser."

I am therefore of opinion that the deed of trust to Doswell, trustee, operated to transfer the wood not only which Mrs. Kersley then owned, but that to which she subsequently acquired title, and that the bill of sale, or agreement, between her and Luck is subordinate to the said deed of trust.

What is severed timber under contract selling trees?

A saw-mill man, or any other person, who buys standing trees, buys real estate. This is settled. But when the trees are paid for, and are severed from unemcumbered land, and made by him, or his agents, into plank, cross ties, cord wood, or even logs, then the trees are converted into personal property. The vendee of the trees by his labor, expenditure of money, and time, owns the product of the soil as his personal property, and all the rules re-

lating to personal property apply. They are his by his exercise of ownership, by his manual possession, it may be said, by the open and notorious acts in having the saw mill on his vendor's place, his teams and equipments. Possession is complete, and no innocent purchaser for value and without notice can claim this property, and if under such conditions the original vendor of real estate sells it, such vendor is selling what he does not own, and to which he has no title, and can give none, agreeable to the maxim, nemo dat quod non habet. And this is especially true when the saw mill, the teams and equipments of the saw-mill man are on the premises of the original vendor. To hold otherwise would practically drive saw-mill men out of the business. However, there may be occasions, based on particular contracts, by which an innocent purchaser for value might be protected, and hence the importance of having all contracts recorded.

"Whenever timber, or other growth of the soil, is severed from the freehold under the contract, it becomes personal property, the title to which is vested in the vendee absolutely, and the rule applies that where chattels belonging to one person are placed or left on the land of another, with permission of the latter, the owner of the chattels has an implied irrevocable license to enter and remove them." Benj. on Sales (2nd Amer. Ed.), note Y. to § 126.

"The act of severance is an important step. It changes the nature of the timber from real estate to personal property. By the very act of cutting, the vendee takes actual manual control and possession of it." Buskrick Bros. *v.* Peck, 50 S. E. 433.

In Null *v.* Elliott, 43 S. E. 174, it is held, that on severance of timber it ceases to be real estate and becomes personal property, and that the purchaser is entitled to all the timber severed within the time limit and has the right to enter and remove the same.

"In some instances the necessities of the case render a technical delivery impossible; in such cases the usual penalties will not be visited upon the purchaser. A symbolical delivery of a large quantity of logs, landed upon a stream preparatory to driving, has been considered sufficient." "The law accommodates itself to the necessities of business and the nature of the property." Wait on Fraud. Conv., § 262.

In Macomber *v.* R. R. Co., 62 Am. St. Rep. 713 (108 Mich.), it is held, that timber which is cut within a time specified in the contract between vendor and vendee, becomes the personal property of the vendee and remains such, though it is not removed from the land within the time agreed upon.

In Keystone Lumber Company *v.* Kelman, 59 Am. St. Rep. 955 (Wis.), it is held, that a person having license from true owner of land to cut timber, has no title in standing timber, but

upon severance by a trespasser he can bring replevin against trespasser for timber so severed by him. And in the same case it is held, that the "licensor has no just claim because he has sold it and has had his pay. * * * To preserve the legal title to him, beyond the severance, can have no other effect than to obstruct justice. In justice, the severed timber should belong to the licensee, who has bought and paid for it."

In an extended note to Lawrence *v.* Spencer, 31 Am. St. Rep. 714, it is held: "When the owner of land, for a valuable consideration, orally licenses another to cut off timber thereon, and subsequently, before the license is executed, conveys the land to a third person, such conveyance where made known to the licensee, operates as a revocation of the license, although the grantee had notice of it. But when such license has been executed in part, it will not deprive the licensee of the right to enter and remove the timber cut down at the time of the conveyance."

In Johnson *v.* Smith, 50 S. E. (Ga.) 135, it was decided that though the time limit had expired under the contract between vendor and vendee for the sale of timber, the vendor could not convert to his own use the ties of the vendee which were cut and made from the timber, but left on the land of the vendor, there being no contract of forfeiture. In the course of its opinion, the court says: "At any rate, we are clear that when the trees and logs were manufactured into cross ties, the title to the ties passed to Johnson (vendee) absolutely and for all time." Fitch *v.* Burke, 38 Vt. 683, follows same line.

The question arises in this case not because the court is of opinion that the rights of an innocent purchaser are effected, but because the court is of the opinion that it made but little difference to the parties concerned whether the deed of September 8th, 1904, from Kersley to Luck for standing trees, was ever recorded, or not, after Luck had severed, before the deed to Doswell, the trees by open and notorious acts, which were enough to put the world on notice, and had thus converted them into his personal property, and because Luck had the right to do as he pleased with his own personal estate, and this right he exercised by selling 239 cords of wood to Mrs. Kersley anterior to the deed of trust to Doswell, and 321 cords about the 15th day of March after its date. This is Luck's own testimony. His saw mill had "pulled out" on the 29th day of February (evidence of Luck, p. 2); he was no longer on the premises. Mrs. Kersley was beginning to exercise acts of ownership over the wood—had actually moved some of it away and sold it, though it is charged she did this secretly—Luck had abandoned actual possession; and delivery had been made as far as such property could be delivered. It was not until the 9th day of April that he attempted by writing

to obtain a vendor's lien. If it was "sold" (and we cannot doubt it was) to Mrs. Kersley by Luck and left in his possession, then that fact made it none the less an executed contract good at least between the parties, the vendor having a property in the price and the vendee a property in the wood; but if it was in her possession at any time by virtue of a sale and before the bill of sale of the 9th of April, as the court believes, then she had the power and right to sell it to whom she pleased, and though she had no title to it at the time she gave the deed of trust to Doswell, trustee, yet it enured as we have seen, to the benefit of her trustee. If, therefore, Luck lost his possession, he lost his common-law lien, if any he had. Benj. on Sales, § 797, 2d Am. Ed.

Then it becomes necessary for him to secure himself against an innocent purchaser for value without notice, by a writing duly recorded, and this he attempted to do by the paper writing dated 9th of April, while the deed of trust given on this same wood was recorded on the 12th of February preceding.

If Luck had not sold his wood to Mrs. Kersley, the case would have been quite different. When Luck testifies without qualification, he sold the wood, we are forced to the conclusion that there was an executed contract, with all its legal consequences. If he had a lien for the purchase price, or a debt, it then came under the recording acts, and this lien, if not recorded, would not avail him over the claims of an innocent purchaser for value and without notice.

One crucial test is: If the wood had been destroyed, whose loss would it have been? It would undoubtedly in this case have fallen on Mrs. Kersley. "In case of Farling *v.* Baxter, we are told that when there is a contract for immediate sale, and nothing remains to be done by the vendor, as between him and the vendee, the vendor immediately acquires a property in the price and the vendee a property in the goods, and all the consequences resulting from the vesting of the property follow; one, of course, is, that if destroyed the loss falls upon the vendee." Seventeenth section of English Statute of Frauds has never been adopted in Virginia, but the common-law rule as to sale of chattels has already been applied here. Chapman *v.* Campbell, 13 Gratt. 109. And see also, Haxall *v.* Willis, 15 Gratt. 444; Benj. on Sales, 2d Amer. Ed., § 315, and note f.

In my opinion the recent amendment to § 2465 of the Code means no more than this: If there is a bill of sale and possession is left with vendor, in order to defeat the claims of purchasers for value without notice, it must be recorded. If there is no bill of sale, and possession is left with vendor, it is prima facie fraudulent, according to the law as laid down in Davis *v.* Turner. "Par-

ties are still left to buy and sell without any writing," as stated by Prof. Lile, 4th Va. Law Reg. 617.

NOTICE.

The point raised that Cardwell being the president of the bank, and true he drew the deed of September 8th, 1904, and having such notice as shown, this was notice to the bank, is not tenable. The rule is settled that "knowledge of facts acquired by an officer or agent of a corporation is notice to the corporation, if acquired by him while acting within the scope of his duties, but not otherwise." Clark on Corp., page 502; Taylor Pr. Cor., § 210; Amer. Notes to Le Neve *v.* Le Neve, Ld. Cas. Eq., vol. 2, part 1, 116. The case as made out shows that Doswell, trustee, is an innocent purchaser for the value without notice, as heretofore stated, and is entitled to the wood "cut and corded" which is in controversy in this suit, and which was carried by the deed of trust as stated in this opinion. Arbuckle *v.* Gates, 95 Va. 802; Fisher *v.* Lee, 28 Va. 159.